UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| JONATHAN PESCE,<br><br>Plaintiff,<br><br>-v-<br><br>THE CITY OF NEW YORK, ELI J. KLEINMAN, AS CHIEF SURGEON OF THE NEW YORK CITY POLICE DEPARTMENT, AND WILLIAM BRATTON, AS COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT,<br><br>Defendants. | 12cv8663 (DLC)<br><br>MEMORANDUM OPINION & ORDER |

APPERANCES

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DENISE COTE, District Judge:

The above-captioned action is set for trial starting on May 2, 2016. This Opinion addresses two issues relating to how the jury will be charged. For the reasons that follow, the jury will not be charged with either (1) a claim that the New York City Police Department ("NYPD") administered an unlawful pre-offer medical examination, or (2) that Pesce may be awarded

money damages from Doctor Eli J. Kleinman ("Kleinman") or Commissioner William J. Bratton ("Bratton").

## Discussion

### I. Pesce's Claim for Pre-Offer Medical Examination

In the pretrial order, and in his proposed jury instructions, Pesce argues that the NYPD "subject[ed] Mr. Pesce to an unlawful medical inquiry before it made a conditional offer of employment." The relevant ADA provision provides that preemployment, "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." 42 U.S.C. § 12112(d)(2)(A). There are two exceptions to this prohibition. The first is that "an employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions." Id. § 12112(d)(2)(B). The second is that "a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant." Id. § 12112(d)(3).

This claim was not alleged in the complaint. Federal Rule of Civil Procedure 8(a) provides that a complaint "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The purpose of this rule is "to provide fair notice of the claims

and to enable the adverse party to . . . prepare for trial." Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988). There is no indication that Pesce disclosed his intention to advance this claim at trial until the filing of the joint pretrial order on April 15, 2016, long after the close of discovery and summary judgment practice. Accordingly, this claim is not part of Pesce's complaint, and may not be raised at trial.

Allowing Pesce to pursue this claim during the trial would prejudice the defendants' ability to put on their defense. The prohibition against pre-offer medical examinations is within a different subsection of the ADA and involves different elements than the claim pleaded in the complaint, which asserted that Pesce was discriminated against because the NYPD applied a blanket policy against individuals with epilepsy. The plaintiff's pre-offer medical examination theory was not addressed by the defendants in their answer, summary judgment papers,[1] the pretrial order, or their requests to charge. This is not surprising as the claim was not in Pesce's complaint.

[1] Notably, the defendants' summary judgment papers requested that the Court dismiss Pesce's claims in their entirety but did not address whether the NYPD administered a pre-offer medical examination. Pesce's opposition brief did not address the absence of any arguments relating to a pre-offer medical examination.

Pesce argues that although this claim was not expressly included in the complaint, it is preserved for trial because the complaint makes reference to his earlier filing with the Equal Employment Opportunity Commission ("EEOC"),[2] which included a claim that the NYPD administered an unlawful pre-offer medical examination. Pesce relies on two cases for this proposition: Kpaka v. City Univ. of New York, No. 14cv6021, 2015 WL 4557331 (S.D.N.Y. July 28, 2015) (dismissing disability claim as not reasonably related to EEOC claims), and Muhammad v. New York City Transit Auth., 450 F. Supp. 2d 198 (E.D.N.Y. 2006) (dismissing race discrimination claim as not reasonably related to EEOC claims). These cases are inapposite. In each of them the court examined an EEOC complaint to determine if the discrimination claim pleaded in a complaint filed in federal court should be dismissed for failure to exhaust administrative remedies. In each case the district court dismissed the claim as not reasonable related to the claims pursued before the EEOC. These cases do not support Pesce's argument that he may raise claims at trial which he never pleaded in his complaint by making a passing reference in that complaint to his prior EEOC

[2] The complaint makes only a passing reference to Pesce's EEOC complaint, stating only that Pesce timely filed a complaint with the EEOC and that the EEOC issued a Notice of Right to Sue.

filing. Accordingly, Pesce will not be permitted to raise a pre-offer medical examination claim at trial.

## II. Pesce's Claim for Damages against the Individual Defendants

In Pesce's proposed jury charge, he requests a charge that the two individual defendants can be held personally liable for money damages under the New York City Human Rights Law. This request is inconsistent with the complaint, which indicates that these individuals are being sued in their official, rather than personal, capacities.

"Where . . . doubt may exist as to whether an official is sued personally, in his official capacity or in both capacities, the course of proceedings ordinarily resolves the nature of the liability sought to be imposed." Rodriguez v. Phillips, 66 F.3d 470, 482 (2d Cir. 1995). Factors that are relevant to this analysis include, inter alia, (1) the substance of the complaint, (2) whether the defendants raised defenses applicable if they were being sued in their individual capacity, and (3) whether the defendants are still employed at organization where they worked when the claims arose. Id. No single factor is dispositive; the Court must consider the "totality of the complaint as well as the course of proceedings." Yorktown Med. Lab., Inc. v. Perales, 948 F.2d 84, 89 (2d Cir. 1991).

Considering the totality of the complaint and the course of the proceedings in this action, the individual defendants are

being sued in their official capacities. First, in the caption of his complaint, Pesce lists Kleinman and Kelly as "Eli J. Kleinman, as Chief Surgeon of the New York City Police Department," and "Raymond W. Kelly, as Commissioner of the New York City Police Department." The only reference in the complaint to either Kleinman or Kelly is a brief description of their positions in the NYPD and their residency status. There are no allegations in the complaint as to either Kleinman or Kelly's personal involvement in the alleged discrimination against Pesce. Since the complaint sought injunctive relief, as well as damages, it was not surprising that the complaint sued not only the City of New York, but also individual defendants in their official capacities. See Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) (claims under the ADA for prospective injunctive relief may, under the doctrine established by Ex parte Young, 209 U.S. 123 (1908), proceed against individual officers in their official capacity."). Nor did Pesce address the personal involvement of the individual defendants in the joint pretrial order.

Second, the defendants did not raise defenses that would be relevant if Pesce were suing the individual defendants in their individual capacities. For example, to obtain an award of damages against the individual defendants, Pesce would have to prove either that the individuals had the power to hire Pesce or

aided and abetted discrimination by actually participating in the discriminatory conduct. See Feingold v. New York, 366 F.3d 138, 158 (2d Cir. 2004). The defendants did not address these elements in their answer, their summary judgment papers, or the pretrial order. There is nothing in the record to indicate that the defendants had notice that Pesce would seek damages from the individual defendants until Pesce filed his proposed jury instruction on April 15, 2016, less than three weeks before the trial date.

Third, while Kleinman appears to still work for the NYPD, Kelly is no longer the Commissioner of the NYPD. In an Opinion of February 5, the Court substituted Bratton for Kelly under Federal Rule of Civil Procedure 25(d), which provides that "[a]n action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party." Fed. R. Civ. P. 25(d) (emphasis added). Pesce did not object to this substitution, which was predicated on the individual defendants being sued in their official capacities only.

In sum, the proceedings in this action reflect that the individual defendants are being sued in the official capacities only. To charge the jury otherwise would be highly prejudicial to the defendants, who appear to have had no notice until April

15 that such a theory would be advanced at trial. Accordingly, the jury will not be charged that money damages may be awarded against the individual defendants.

**Conclusion**

The jury will not be charged, and Pesce will not be allowed to argue at trial, either that (1) the NYPD administered an unlawful pre-offer medical examination, or (2) that Pesce may obtain an award of money damages from the individual defendants.

Dated: New York, New York
April 29, 2016

DENISE COTE
United States District Judge